EMPLOYERS' LIABILITY AND ACCIDENT INSURANCE.[1]

I.

AN illustration of the defective foreign-news service of the American press is afforded by the almost complete ignorance that exists here to-day concerning one of the most far-reaching social movements of the nineteenth century. Although the foremost topic of public discussion in the countries of Europe has lately been the problem of accidents to workingmen, the cable despatches published in our newspapers have scarcely given an inkling of the fact; and while England, France, Denmark and Italy within the space of eight months (from August 6, 1897, to April 9, 1898) all enacted comprehensive laws, based on entirely new principles, for the protection and indemnification of wage earners exposed to industrial risks, the only echo of this almost revolutionary movement that reached the readers of American journals was the report that the Swiss people had made use of the referendum to defeat a proposed law for compulsory sickness-and-accident insurance! The explanation of such apparent prejudice or indifference on the part of foreign correspondents may be left to others with a better knowledge of the cause; the present writer is concerned rather with the contrast between European and American principles of legislation in this important field.

[1] The principal authority followed in this paper is the *Seventeenth Annual Report of the New York State Bureau of Labor Statistics* (1899), Part II of which is devoted to the subject of "The Compensation of Accidental Injuries to Workmen." As this document is fully indexed, the present writer deems it unnecessary to make specific references. The *Report* also contains bibliographies of the best sources, to which may be added the following recent articles:

"Accidents to Labor," by W. F. Willoughby, in the *Bulletin of the United States Department of Labor*, January, 1901.

"The British Workmen's Compensation Act," by A. M. Low, *ibid.*

"Present Status of Employers' Liability in the United States," by S. D. Fessenden, *ibid.*, November, 1900.

To begin with, it may be stated as emphatically as possible that European interest in the problem has not been due to any greater frequency of industrial accidents abroad than in the United States. On the contrary, as might be inferred by any one who stops to think of the incomparable energy, restlessness and fearlessness of American workingmen, of the relatively high intensity of work in American shops and factories, and of the vastly greater use that our people make of machinery, more workmen, relatively, are injured here than abroad. Statistical demonstration of this might be extended to an indefinite length; but it will be entirely sufficient to cite the fact that the American railways, as compared with the British, have *twice* the number of employees and every year kill *four times* as many of them, — the annual ratio of accidental deaths to total employees of all classes being 1 to 420 in the United States as compared with 1 to 950 in Great Britain. And if in Germany, with its 50,000,000 people, 8000 wage earners are killed and more than 400,000 injured every year, we are fairly safe in assuming that in the United States, with its 75,000,000 people, the army of employees annually killed or injured is fifty per cent greater. The problem of industrial accidents, then, exists as surely in the western hemisphere as in the older continent.

Two possible reasons may be advanced for the fact that the problem has attracted little attention here outside of purely academic circles, while in Europe it has agitated popular forums and extorted consideration from statesmen. The contrast probably rests, first, upon differences in the economic situation of workingmen on the two continents, and secondly upon differences of legal philosophy. European workmen, with their cramped position, their slender resources and the burden of militarism, have not been able to obtain an adequate reward for their toil, and hence are likely to be financially crushed by comparatively slight misfortunes and thereby thrown upon the public charities for maintenance. American workingmen, on the other hand, have earned and received high wages and have thus enjoyed what their European *confrères* would call financial independence; their savings or their insurance in fraternal

orders have enabled them to withstand the effects of all but the most serious physical injuries without becoming a burden upon the public. Such relative financial independence, however, is becoming far less general in the United States, and it is in recognition of this fact that many of the larger railroad systems have established relief funds or pension departments through which the employer makes some contribution to the alleviation of distress among his injured employees. In the great stock yards, sugar refineries, iron and steel works and other industrial plants of American cities the foreign-born laborers earn so little money above their minimum requirements that a severe injury is almost sure to make them dependent upon public or private charity. The natural and logical remedy would be a law requiring all employers to act toward their injured workmen as liberal employers already act — to pay the necessary medical expenses and a moiety of the wage of the victim during the period of disablement from work.

That such a law has nowhere been enacted in America may be in part ascribed to the prevalent individualistic philosophy, which, refusing to look at the social effects, decrees that the wage earner, in accordance with tradition, must carry the ordinary risks of his occupation. It is assumed that, before accepting employment, the workman will calculate the relative advantages and disadvantages of his prospective occupation, including the probable danger to life and limb; and that his remuneration is thereupon so adjusted that his wages will include compensation for possible injury.[1] This legal fiction,[2] however, has no basis in fact; railroad trainmen, for instance,

[1] *Cf.* the opinion of Chief Justice Shaw of Massachusetts in the leading case of Farwell *vs.* Boston and Worcester, 4 Met. 49: "The general rule resulting from considerations as well of justice as of policy, is that he who engages in the employment of another for the performance of specified duties and services, for compensation, takes upon himself the natural and ordinary risks and perils incident to the performance of such services, and, in a legal presumption, the compensation is adjusted accordingly."

[2] It has been so characterized by Judge Earl of the New York Court of Appeals: "To enforce the supposed public policy, a fiction has been invented by which the servant is said to assume all the risks of the service in which he engages." — Crispin *vs.* Babbitt, 81 N. Y. 529.

obtain no more than the wages of ordinary laborers, although one out of every eleven of them is seriously injured every year. Sailors, miners, quarrymen and other workmen in extra-hazardous trades are paid no more than laborers in other occupations excepting where the matter of skill enters into the question. To suppose that these wage earners ever seriously consider the matter at all, is to impute to them a measure of foresight and of economic strength in the wage bargain that is found only in the skilled artisan class, the "aristocracy of labor."

Nevertheless, the two reasons above recited (the relative economic independence of American wage earners and the prevalent individualistic philosophy) explain why in this country all practical efforts thus far made to deal with the problem of industrial accidents have been limited to proposals for altering the law of negligence so far as it concerns the relation of employer and employee. Premising that the employees assume the ordinary risks of their occupations, the law holds the employer responsible for accidents due to his own negligence, precisely as it holds any person liable to pay damages for such neglect of his duties as results in injury to other persons. But in one essential respect the common law of England and America has discriminated against the servant or employee: it has refused to maintain the doctrine of principal and agent in the case of accidents caused by negligence when the person injured is an employee of the person by whom, or upon whose behalf, the act of negligence was committed.

To illustrate: if a groceryman's delivery wagon runs down a pedestrian, who himself is not at fault, the pedestrian has the right of action for damages not merely against the driver but also against the principal, the groceryman, who may in fact have given the most precise instructions to his driver about exercising vigilance and respect for the rights of pedestrians. This ancient and firmly established principle of *respondeat superior*, whereby the principal must answer for negligent acts of his agent, rests purely upon the expediency of giving the victim a legal claim upon some party who is pecuniarily

responsible — in other words, some one who can pay damages. It is, apparently, a universal principle of law, and its justification, aside from the motive of expediency just indicated, rests upon the idea that if a man finds it convenient or profitable to delegate any part of his work to others, he must still be ready to furnish satisfaction for injuries growing out of such work; if he fears to risk his property by thus giving bonds for the conduct of his agents, he has the alternative of doing his own work alone. Now the injustice of the American law of negligence, as applied to employees, lies in the fact that our courts have created an exception to the universal principle expressed in the maxim *respondeat superior* by refusing to hold the principal responsible for the negligence of an agent when the person injured is a fellow-employee. To recur to the illustration: if the supposed pedestrian run down by a careless driver of a grocer's wagon happened to be a clerk in the employ of the same grocer, he could not obtain damages from the principal.

Crudely illustrated, this is the famous "fellow-servant doctrine" which has naturally evoked antagonism on the part of American workingmen. It is a doctrine that is not tolerated in Continental courts, and it was largely abolished by statute in England more than twenty years ago. It has also been considerably modified either by legislation or by judicial decisions in most American commonwealths.[1] But workingmen look upon it as a burden even in its modified form, and to it is apparently due most of their present discontent. Will they be satisfied with its entire abolition? Is an employer's liability law, perfected on these lines, really a solution of the problem of accidents to labor? That question may most properly be answered by reviewing the experience of other countries.

[1] In recent years the courts have stretched the doctrine of "vice principal" so as to cover many co-employees of an injured workman. That is to say, if the agent whose negligence brought about the injury to a co-employee was performing any of the duties properly belonging to the employer, he is regarded not as a "fellow-servant," but as a "vice principal," or *alter ego*, of the employer, who thus becomes liable for damages.

II.

In Germany, as in England and the United States, the problem of industrial accidents did not assume prominence until the advent of railways; but in the German states the legislature did not step aside and leave the courts to develop a law of employer's liability. On the contrary, railway construction had scarcely begun in Germany when in 1838 the Prussian legislature enacted a law which provided that every railway company should be liable for personal injuries to employees (as well as to passengers), unless it could prove in court that the accident was occasioned by the negligence of the victim or by an act of Providence; and still further to strengthen the employee's case, the law specifically provided that the risks inherent in the railroad business should not be considered as rendering accidents inevitable, and hence should not exempt the corporation from responsibility. This Prussian law of 1838 thus goes far beyond the demands of American workingmen at the present time, at least so far as respects railways, which are in truth the subject of most of the agitation; for it transfers the burden of proof from the shoulders of the injured employee to those of the corporation. It distinctly directs that the employer, and not the employee, is to assume the ordinary risks of the industry.

Upon the formation of the German Empire in 1871, this Prussian act of 1838 was embodied in a general liability law for the Empire, which also defined, though in less stringent terms, the liability of proprietors of factories, mines, quarries, *etc.* The enormous industrial expansion of Germany, following its consolidation under a strong government, rapidly transformed the small shops of handicraftsmen into great factories, in which the employer's responsibility for his workingmen was dissipated among numerous superintendents, foremen and others who assumed certain of his functions of control. The conditions of labor in factories and mines began to approximate those on the railways, and the earlier reform movements sought to extend the provisions of the railway liability law to the

manufacturing industry and other employments. But farsighted economists — Schäffle, Wagner, Schmoller and others — deemed such a reform entirely inadequate, holding that, because of the difficulty of locating the negligence, the law of negligence could by no possibility be sufficiently perfected to secure for injured workmen proper compensation. This difficulty was set forth in the preamble of the accident-insurance bill of 1881.

> To burden the person injured with the requirement of furnishing proof of negligence on the part of the employer or his agents, transforms the beneficence of the law for the workingman into an illusion, in the majority of cases. The procurement of such evidence, sufficiently difficult in any event, is not seldom rendered impossible as respects some of the most severe injuries brought about by natural forces, as happens in mines, establishments with steam boilers, and factories for the manufacture of explosives. Herein the condition of the work-place, the implements and appliances, upon which the whole case of the workman really turns, is so altered by the accident itself as to be unrecognizable; while those persons through whose testimony alone negligence in many cases can be proven have been killed or injured by the accident. The injured, even if not, as is generally the case, parties to the suit, are left in such condition by the catastrophe as to be unable to give formal testimony.

Without entering further into the legislative history of the question, it will be sufficient to state that the economists, aided by Emperor William I and Bismarck, finally triumphed in the passage of the act of 1884, which made employers responsible for all accidents to employees in the course of their occupation except such as should be occasioned by the willful misconduct of the victims themselves. This minor exception is virtually all that is left in Germany of the law of negligence so far as it concerns employees.[1]

To comprehend fully the methods of the German law for indemnifying workmen injured at their work, one must consider an analogous law enacted two years earlier (1882), namely, the sickness-insurance law. This act requires the

[1] Of course employers may still be sued for negligence; but such actions are brought only when the negligence is so gross as to promise a considerably larger compensation than that afforded by the accident-insurance law.

establishment of sick funds in all industries, one-third of the contributions to come from employers and two-thirds from the working people. Any employee injured while at work is cared for by the sick funds for the first *three months after the accident;* but if at the end of these thirteen weeks, he is still incapacitated, he is entitled to an allowance equal to two-thirds of his wages, besides the medical expenses, out of a fund maintained by the employers. If he dies at any time as a result of his injuries, his family is entitled to a yearly pension not exceeding sixty per cent of his wages.

In order to guard the employee against the possible loss of his compensation or allowance through the bankruptcy or failure of his employer, the law provides for the collective responsibility of employers; that is, all employers are grouped together into associations by industries (*Berufsgenossenschaften*), and each association pays the claims of workingmen employed by its own members. The members of each association are annually assessed, according to the size of their pay rolls and the hazard of their business, at a rate sufficient to pay the death claims, the benefits to temporarily disabled workmen and the pensions to entirely incapacitated workmen and the families of employees killed by accident. The assessments must also cover the administrative expenses of the association, which include the salaries of a large number of engineering and mechanical experts employed by the associations to inspect the factories of members and see that the best appliances are bought and used for safeguarding dangerous machinery. Briefly put, the German law requires every employer to join a mutual insurance company, which indemnifies his employees for all personal injuries sustained in the course of their employment, the question of negligence on one side or the other having nothing to do with the amount of such indemnification,[1] which is fixed by the amount of the employee's wages and, in case of his death, the number of surviving dependents.

[1] With the qualification that no compensation is paid when the injury is due to the victim's willful misconduct—which in practice has proved unimportant—and that the victim may sue for damages when the employer has been grossly negligent.

The administrative machinery for determining the compensation is prescribed by the law; but, on account of limitations of space, cannot be described here.[1]

For eighteen years now this compulsory accident-insurance system has been on trial in Germany, and its success can no longer be seriously questioned. It has been successively extended by the law-making authorities, and when in 1900 it was thoroughly overhauled and revised the changes were wholly in the direction of enlarging its scope. The broad result is to be seen in the following facts: About 20,000,000 persons, or nearly two-fifths of the entire population and ten-elevenths of that part engaged in gainful occupations, are protected by the insurance system, and any one of these persons, in case of a disabling accident, may claim a living allowance as a right and not as a charity; each year about 100,000 accidental injuries are indemnified, of which one-half are cases of temporary disablement (exceeding, however, a duration of three months) and one-half cases of permanent disablement or death; about $20,000,000 are annually expended through this system, of which eighty or eighty-five per cent is actually paid to the sufferers, about two per cent being expended for the prevention of accidents, and the remainder representing the expenses of management. The actual burden of this insurance upon German industry cannot be determined, for the reason that permanently injured employees are not indemnified with a lump sum of money, but are pensioned with an annual, or quarterly, allowance for life. Nevertheless, the annual expenditures, which are almost identical with the assessed contributions of employers, have lately averaged only $1.22 per $100 of the annual wage roll, and this is a lower rate than any prevailing from 1892 to 1897. Of course the rate varies enormously from industry to industry, according to the relative risks of accident; it is about twenty-four times as great in mining as in the tobacco industry, which is the least hazardous of the manufactures.[2]

[1] *Cf.* POLITICAL SCIENCE QUARTERLY, VI (March, 1891), 43.

[2] In 1897 the amount actually paid in the indemnification of injuries was $1.78 per $100 of wages in mining, and only 8 cents in the tobacco industry.

III.

The other countries of Europe had been as much concerned as Germany with the question of reforming the law of liability, but they postponed action in order to await the result of the German experiment. Only Austria, which is for the most part a German country, accepted at once the new principle of incorporating in the cost of production of manufactured goods, by the side of the allowance for wear and tear of machinery, an item for the wear and tear of human operatives. But the Austrian law of 1887, though it insures compensation for all injuries, regardless of the question of negligence, differs in many respects from the German law. It permits employers, for example, to deduct ten per cent of their assessments from the wages of employees, and it requires the capitalized value of each pension to be paid at the time of the accident.[1] Again, the collective responsibility of employers is secured, not, as in Germany, through associations for different industries, only the railroads having a trade association, but through seven provincial or district associations. Furthermore, the government itself does not undertake the business of insurance, although it establishes the rates. Additional variations from the German law can also be found in the scale of compensation, but these need not be entered into at this point.

The other Teutonic nations of northern Europe could not but be influenced by the long discussion of employer's liability and accident insurance in Germany and the final adoption of the latter principle. Within a few months after the enactment of the German law of 1884 parliamentary commissions were at work in Norway, Sweden, Denmark and Finland, gathering statistics of accidents, of the methods in vogue for alleviating distress in the families of the stricken workmen, *etc.* The

[1] It appears that the actuaries put the rate of the contributions somewhat too low when they calculated that the average assessment would have to be $1.40 per $100 of the annual pay roll; whereas, for the seven years 1890–96, the net charges amounted to $1.55 per $100 of wages. The premium required in certain dangerous industries also proved too low, and the next revision of the schedule of rates will result in many increases and but few reductions.

Norwegian commission completed its labors and presented draft bills in 1890, and in 1894 the legislature fully accepted the principle of compulsory compensation for all accidents and enacted an accident-insurance law. This law more closely resembles the Austrian than the German act. Compensation begins four weeks after the accident and is fixed at sixty per cent of the victim's wages; in the event of his death the pension to his family is not to exceed fifty per cent of his average annual income. In Norway, as in Germany, the expenses of indemnification of injuries are to be paid by the employers without deduction from wages; but in Norway the state guarantees the indemnities and collects the assessments from employers through a state insurance office, the expenses of which are a state charge.

In 1895 Finland enacted a workmen's compensation law of less comprehensive scope. While it provides a scale of compensation and requires employers to insure their employees against accident through authorized companies or by depositing securities with the government, it does not grant compensation to employees injured through the fault of fellow-workmen or *vis major*. In other words, it does not cover the unavoidable mishaps which constitute the bulk of all industrial accidents.

The Danish parliamentary commission made its report in 1888, but, owing to differences of opinion as to the wisdom of a system of obligatory insurance, the legislature did not agree upon a law until 1897.[1] The action of Great Britain seemed to have a decisive influence in crystallizing sentiment in Denmark, as in the other Continental states. On account of the far-reaching influence of English policy, it is advisable to consider somewhat carefully the steps by which the British Parliament at last definitely abandoned employer's liability based upon the law of negligence and accepted the principle of compensation for all accidents.

[1] Sweden, the remaining Scandinavian country, did not enact an accident-insurance law until 1901.

IV.

As we have already seen, the judge-made law of employer's liability, embracing the indefensible doctrine of common employment, had operated in England and the United States to the great injury of the English and American workmen. And the fact that the "fellow-servant doctrine" was upheld so much more rigorously by the English courts, dominated by the capitalistic House of Lords (the final court of appeal in Britain), as well as the greater relative importance of machine production, inspired in England a movement for legislative definition of the law of liability and led to the adoption of the Employer's Liability Act of 1880, which has served as a model for several American statutes. While this act removed some of the more unjust defenses utilized by employers to avoid the penalties of their negligence, it failed to give general satisfaction. Amendments were offered at nearly every session of Parliament and several commissions were appointed to examine into the question. Finally, in 1893, the Gladstone government accepted the views of the workingmen and introduced an employer's liability bill that was calculated to destroy the doctrine of common employment root and branch. This bill passed the House of Commons, but came back from the House of Lords with unacceptable amendments concerning the power of employers to contract themselves out of their liability by special agreements with their employees. The consequent defeat of the bill ended the prospect of legislation under the Liberals.

But the situation so urgently demanded reform that the Conservatives, upon their accession to power in 1895, could not decline to act, especially in view of their obligations to the Liberal-Unionist wing, which, through its leader, Joseph Chamberlain, had promulgated a really liberal labor program, including reform of the liability law.[1] The government bill, introduced at the session of 1896–97, went far beyond any of the proposals of the Liberal government by offering

[1] See Mr. Chamberlain's article in the *Nineteenth Century*, November, 1892.

compensation for all accidental injuries, quite irrespective of the negligence of this person or that.

The debates upon this bill fill several hundred very interesting pages in Hansard. The average member of Parliament, who was likely to be an employer, could not at first understand why he should pay indemnification for injuries for which he was not to blame. But the history of employer's liability throughout the era of machine production had demonstrated the impossibility of locating the blame, since, as a matter of fact, the great bulk of industrial accidents are virtually unavoidable. Any person can see that the operator of a buzz saw is exposed to greater risks than a cigar maker, and no amount of care on the part of the employer or the operator will serve to equalize the risks. For the vast majority of accidents, therefore, the liability of an employer under the law of negligence affords no remedy to the victim. Striking evidence of this fact was adduced in the testimony taken by the Royal Commission on Labor in 1894, when one of the great accident-insurance companies testified that in 26,087 cases of accidental injury which it had indemnified under collective accident-insurance policies carried by employers, not more than 3026, or twelve per cent, would have been entitled to compensation under the law of negligence.

Now assuming that a liability law based on negligence would compel employers to pay compensation for that twelve per cent of the injuries to their employees, it could be easily demonstrated that the uncertainties, the expense and above all the bitterness of class feeling, incident to such legal conflicts, would frequently outweigh the advantages of the law. Such a law must of necessity be full of uncertainties, because it attempts to define the duties of employer and those of the employee, duties which are constantly shifted with the progress of invention and the adoption of improvements. One week a court may have held that it was not the employer's duty to provide certain safeguards for a machine because such provisions had not become a part of the usual customs and practices of the business; another week the same court might decide that such guards were necessary and reasonable. In

one case, where scaffolding has given way and a workman has been seriously injured, it is decided that the foreman, acting for the employer, should have inspected the defective scaffolding; in the next case it may be held that the obligation of inspecting the scaffolding rested upon the employee himself. Numerous cases of fatal accidents also occur in which the evidence of negligence is destroyed and the workingman's family is thus deprived of their rightful indemnification, even though the law itself may be clear; such cases are of frequent occurrence among colliery explosions, where the witnesses perish along with all evidences of possible negligence.

If the uncertainty and expensiveness of legal actions for damages were not sufficient to deter an injured employee from proceeding against his employer, he would be deterred by the apprehension of losing employment. The official memorandum of the British Home Office summed up the defects of the employer's liability law from the view point of the workingman in the following single paragraph:

> The truth is that to the workman litigation under the act has more than its usual terrors. It is not merely that litigation is expensive, and that he is a poor man and his employer comparatively a rich one, it is that when a workman goes to law with his employer he, as it were, declares war against the person on whom his future probably depends; he seeks to compel him by legal force to pay money, and his only mode of doing so is the odious one of proving that his employer or his agents—his own fellow workmen—have been guilty of negligence. Add to this that the legal proof of such negligence is often extremely difficult. The broad result is that a legal claim for damages only answers where the injury is very great, and the workman is prepared to leave his master's service.[1]

If uncertainty and expensiveness made the law unsatisfactory to the workman, they did not make it satisfactory to the employer. Liability to pay damages for negligence did not lead to any correspondence between the penalty and the degree of culpability. The most criminal negligence might result in

[1] Appendix to the minutes of evidence taken before the Royal Commission of Labor (1894, c 7063–III A), p. 351.

a trifling injury, compensated at the expense of a week's wages, while some trifling oversight in the selection of materials might lead to loss of life and heavy damage suits. Employers kept in their service an army of lawyers, whose remuneration would have afforded compensation to hundreds of injured employees. On the other hand, many a fairly disposed employer found himself prosecuted by professional "damage" lawyers or "shysters," who stepped in to prevent any peaceable arrangement between him and an injured workman. Mr. Chamberlain, for example, related the experience of a friend who told him that "in two cases which he was absolutely bound to fight and both of which he won, the costs amounted to more than any compensation ever given under the Employer's Liability Act."[1] That act — which, be it remembered, is substantially the law in America to-day — was characterized by Mr. Asquith, the Liberal leader, as "an elaborate series of traps and pitfalls for the unwary litigant, and productive of litigation which, in proportion to its difficulty and cost, is absolutely barren of result."[2]

It was probably the cold, hard fact of the expensiveness of futile litigation under the liability law that appealed more than any other argument to the conservative British capitalists and merchants who compose the House of Commons and induced them to adopt the new principle of compensation for all accidents.

Aside from the experience of foreign countries, — never decisive to an Englishman, — the country already had some evidence of its own as to the probable workings of the new system. After the passage of the Liability Act of 1880, there had grown up in England great insurance companies which made a business of relieving employers of suits for damages brought on behalf of injured employees, the premiums for such insurance being a certain percentage of the annual pay roll. These companies moreover did a real accident-insurance business on a similar basis, issuing to employers for a somewhat higher premium a workmen's collective insurance

[1] Parliamentary Debates, XLVIII (1897), 1465.
[2] *Ibid.*, XLIX, 753.

policy. The statistics furnished by one of the largest of these insurance companies afforded the following instructive comparison:

	Liability Insurance.	Workmen's Collective Insurance.
Claims admitted	1,188	26,087
Claims abandoned	952	97
Claims litigated	327[1]	4
No claims made	7,750	
Total accidents reported	10,217	26,188

It thus appeared that of 10,217 injured employees only 1327, or thirteen per cent, could obtain compensation under the employer's liability law, while under the accident insurance policy all but an infinitesimal number were compensated. The contrast pointed the way to a new system of legislation whereby the compensation of accidents should be a mere business arrangement rather than a matter of law. The British Workmen's Compensation Act of 1897, like the German act of 1884, the Austrian act of 1887 and the Norwegian act of 1894, virtually makes the employer the insurer of his workmen against all accidents. In the words of Mr. Chamberlain, it says to every employer in the industries covered by the act:

> When you enter upon a business you must consider this compensation is as much a trade charge as is now the provision which you are called upon to make for the repair of machinery. You at present have to put aside every year a certain sum for the repair of the inert machinery, which is a factor in your business. Now, the human element in the business has to be considered, and in the case of accident what reparation you can make must be made as a charge upon the business.

The scale of compensation fixed by the law assures to a totally disabled workman a weekly benefit equal to one-half his average wages; to the family of a workman mortally injured, a lump sum equal to three years' wages (but not less than $730 or more than $1460). The disability allowance begins with the third week of disablement.

[1] Of these, 136 were won and 191 lost by workmen.

In passing, it should be noted that the Act of 1897, while affording these new compensations to an injured workman, does not abolish his old rights of action against a negligent employer. On the contrary, he may sue his employer for negligence under the common law or under the Liability Act of 1880, and if defeated may still claim as a matter of right, not to be disputed, the compensation allowed him under the new act. Provided the workman is disabled from earning full wages for a period of at least two weeks, the only defense the employer can offer is that the accident did not "arise out of and in course of the employment," or that it was attributable to the serious and willful misconduct of the workman himself.

This is not the place to enter upon a discussion of the virtues and defects of the English Workmen's Compensation Act of 1897. Certain things about it, however, are clearly established:

1. The principle of compensation for all accidents has been permanently accepted in England; the only amendment made to the act has been one to widen its scope by extending it to agriculture. The occupations not as yet embraced in the law are domestic service, small workshops where no mechanical power is used, buildings less than thirty feet high, mercantile pursuits, trucking and navigation. It will be seen that the only industrial classes still outside the law that are exposed to heavy risks are seamen and fishermen.

2. Litigation, even in the beginning, when the law required interpretation, has been insignificant. In the first six months of its operation not a single litigated case was recorded in some of the principal mining districts, which, with a population of 1,500,000, had innumerable accidents. Probably the experience of the Bolton and District Operative Cotton Spinners' Provincial Association is indicative of the operation of the law. Its report for 1901 shows that since the act came into operation the claims of 640 injured members had been paid, of which only twelve, or less than two per cent, were the subject of litigation. Unofficial returns in other industries show similar results and indicate that the proportion of claims settled without litigation is over ninety-eight per cent.

3. The cost of indemnification has been comparatively low, in spite of the high premiums demanded by insurance companies. In South Roxburghshire, where the insurance companies asked from 22½ to 37½ cents per $100 of the annual pay roll, mutual insurance associations were formed by the employers and indemnities paid on the basis of a premium of only 12½ cents per $100 of wages.[1] As yet the burden of the act, if indeed it has been a burden, has not made itself felt in the competition with foreign countries, most of which, indeed, have similar acts.

V.

The action of England in accepting the principle of compensation of all accidents seemed to bring to a head the discussion that had been going on in other countries for a decade or more. In the four years that have since elapsed, no fewer than nine states have enacted similar laws, including France, Italy, Spain, Holland and Sweden, as well as two of the Australasian colonies. The Danish act of January 7, 1898, has already been mentioned; like the English act, it makes insurance voluntary on the part of employers, but gives the injured employee a prior claim on insurance due to the employer in case of accident. The accident benefit, which does not begin until the fourteenth week, is fixed at sixty per cent of the victim's wages, and the indemnity in case of his death is equivalent to four years' wages.

Italy followed with the act of March 17, 1898, which made insurance obligatory indeed, but left employers the option of insuring in authorized companies, or in mutual associations, or by the deposit of securities with the government. The disability allowance begins on the sixth day after the accident and is equal to fifty per cent of the victim's usual wages. In case of permanent disablement or death, the indemnity is a lump sum equal to five years' wages.

[1] See M. Barlow, "The Insurance of Industrial Risks," *Economic Journal*, XI (September, 1901), 348.

About the same time France was enacting a workman's compensation law. The question had been before the legislature at every session for years, but the Senate and Chamber of Deputies had not previously succeeded in agreeing upon a bill. Now the influence of the English act, combined with the exigencies of local politics and the approach of elections, resulted in the act of April 9, 1898. Under this law the accident allowance begins on the fifth day after the accident, and for temporary disablement is fixed at one-half the victim's average wage, while for permanent incapacity it is two-thirds of his wages. In event of his death pensions to surviving members of his family are not to exceed, in the aggregate, sixty per cent of his annual wage.

The treatment of the insurance problem in this act is peculiar to France, and is the result of a compromise between the Senate and the Chamber of Deputies. Instead of compelling employers to carry insurance for the protection of their employees or to carry insurance against the possibility of their own bankruptcy or failure, the French government guarantees the payment of accident benefits and indemnities. For this purpose a special guarantee fund is to be accumulated by means of a small addition to the regular business tax in the case of concerns subject to the law. This novel experiment will be watched with interest in other countries. While it might easily lead to a state insurance office, France has been noted for the strong development of employers' mutual associations, and it is generally hoped that these may continue to gather strength under the new régime.

No new compensation acts were recorded in 1899, but on January 30, 1900, Spain joined the other industrial countries with such legislation. The Spanish act is rather limited in scope, as it does not require the compensation of inevitable accidents (those caused by *vis major*) and in that particular more closely resembles employer's liability laws. But it provides a definite scale of compensation, the temporary allowance to an injured employee being one-half his usual wages, and the indemnity for permanent disability being a lump sum

equal to two years' earnings. In the case of fatal accidents the indemnity to the victim's family is likewise two years' earnings or, at the option of the employer, pensions equal to not more than forty per cent of the workman's income.

The New Zealand act of October 18, 1900, and the South Australian act of December 5, 1900, are modelled so closely after the English act as to call for no special consideration.

The accident-insurance law enacted by Holland, January 2, 1901, grants perhaps the most liberal terms to the workmen of any of these acts. The allowance, which begins on the day following the injury, is to be seventy per cent of the victim's regular wage, and that is also the ratio in case of permanent (and total) disability. In case of death, the pension to his family is to be sixty per cent of his earnings. Insurance in authorized private companies or the government insurance office is obligatory unless the employer prefers to deposit securities with the government for the payment of compensation to his injured employees. One peculiar feature of the Dutch act is the discrimination against drunkenness; the law provides that if the accident is due to intoxication, the victim shall receive only one-half the usual allowance, and his heirs or dependents none.[1]

On February 21, 1901, the Kingdom of Greece adopted a workmen's compensation act for mines, smelting works and certain quarries, which is peculiar in that one-half of the indemnities due to permanent disabilities and fatalities are to be paid by the Miners' Provident Fund, which is administered by the government. But as the fund is maintained by the taxation of mines, *etc.*, the burden really falls upon the industry after all. The allowance for disablement is fifty per cent of the usual wage.

The Swedish act of April 24, 1901, is not so liberal as the earlier Norwegian act, and the scale of compensation differs from all others in that it fixes an invariable sum as the disability allowance or benefit, instead of a percentage of the wage earned

[1] The Dutch law is summarized in the *Bulletin of the United States Department of Labor*, May, 1901, pp. 190–193.

by each victim; nor does it require indemnification of injuries occasioned by the willful misconduct of third persons, providing they do not exercise authority. By opening the door to disputes respecting the negligence of certain persons and the responsibilities of others, the act thus embodies the usual defect of employer's liability laws, namely, it does not avoid enormous expenses for litigation.

Switzerland is still debating schemes of accident insurance, having accepted the principle more than ten years ago in the form of a constitutional amendment. After long preparation, the federal legislature in 1899 passed a compulsory sickness-and-accident insurance law which was to go into force January 1, 1903; but on the referendum vote in 1900 the law was rejected by a majority of two to one. It seems probable that new projects will be less comprehensive in scope. In the meantime the Swiss have a very liberal employer's liability law, enacted some twenty-five years ago, which, like the Prussian law of 1838, places the burden of proof upon the employer and makes him liable for all injuries, unless he can prove in court that the accident was caused by the act of God or the negligence of the victim.

Russia has a similar law applying to railways and steamships, and is therefore in a more advanced position than the United States.

Belgium is the only other industrial nation of Europe that has not accepted the principle of *risque professionnel*. While a very successful organization of mine owners in Belgium has furnished at its own expense accident aid to injured miners since 1840, interest is by no means wanting in a national accident-insurance system. The ministry itself prepared and introduced a bill in 1898, after the adoption of workingmen's compensation acts in England, France and Italy; but the bill was referred to a commission, and before it was reported the legislature was dissolved and a general election held (1900). Belgium having already enacted an old-age pension law, it can safely be premised that the problem of industrial accidents will not long await a solution.

VI.

The preceding review of European experience with the problem of industrial accidents ought to throw some light upon the probable course of legislation in the United States. Even should the agitation by our workingmen for the statutory abrogation of the obnoxious fellow-servant doctrine prove entirely successful, it will bring us only to the first stage in the evolution of negligence law into accident insurance — the stage reached by England twenty years ago, after the enactment of the Employer's Liability Act of 1880. This act constituted indeed an improvement upon preëxisting conditions; but as a final solution of a large problem it was a flat failure, or, as Mr. Asquith termed it, "a scandal and a reproach to the legislature." We have already sketched its breakdown and noted that its fatal defect consisted in requiring an enormous outlay on the impossible task of locating the blame for the accidents of modern industry. The futile litigation which, on account of its expensiveness, finally convinced Parliament of the failure of negligence law as a remedy for the injuries of employees is characteristic of the United States at the present time. And what is the logical result? The courts, in order to discourage suits and thus restrict the volume of litigation, have betrayed a tendency to throw out cases on technical grounds or to treat lightly the responsibility of the employer. The authors of one of the leading American text-books on the law of negligence plainly declare that

> it has become quite common for judges to state as the ground of decisions, the necessity of restricting litigation. Reduced to plain English, this means the necessity of compelling the great majority of men and women to submit to injustice, in order to relieve judges from the labor of awarding justice. . . . The law of master and servant in its relation to the law of negligence affords perhaps the most striking example in the last half century of gross injustice done by this disposition to restrict responsibility and suppress litigation.[1]

It is difficult to believe that any person at all familiar with the operations of the British act of 1880 can look for any decided

[1] Shearman and Redfield on Negligence (1898), pp. iii, vi.

improvement in American conditions through amendments to the law of negligence.[1] When, in 1893, the Liberal party in England sought to improve the Act of 1880 without abandoning the foundation principle of negligence, the attempt was defeated partly because the bill came to be known not as an Employer's Liability Bill, but as a "Lawyer's Employment Bill." This satirical appellation is really descriptive of all legislation on the present subject that aims to rest the responsibility of employers on the ground of negligence.

The term may be said to apply also to a more advanced type of liability law, which, though it has not as yet been proposed in the United States, was adopted in some European countries in the first half of the nineteenth century; namely, the legislation under which the burden of proof of negligence was shifted from the workman to the employer. As long ago as 1838 the Prussian law required a railroad company to pay damages to injured employees unless it could go into court and there produce legal evidence that the accident was caused by *vis major* or by the negligence of the injured workmen. This is still the law in Switzerland for all mechanical industries, and in Russia and Hungary for transportation companies. But none of these countries has been satisfied with such a law, and all of them have either abandoned it already or are preparing so to do.

The third stage in the evolution of accident legislation is reached when a community has once grasped the principle of *risque professionnel*, — the principle, namely, that every trade and occupation has its own risks or dangers, and that, as the bulk of the accidents therein are unavoidable, they should be paid for out of the profits of that trade and not be saddled upon the families of individual workmen. The demonstration of

[1] It is doubtful if the American statutes modelled upon the British act of 1880 have brought about any perceptible improvement over the common law. This much, at least, is true: the liability insurance companies charge employers no heavier premiums in Massachusetts, which since 1887 has had a "model" liability law, than in the other New England states, which have enacted no such laws. The inference is that disabled Massachusetts workmen get no more compensation than their comrades protected only by the common-law rules.

the truth of this principle waited upon the collection of comprehensive statistics; but since the establishment of accident-insurance systems in several countries, such statistics abound. It will be worth our while just to glance at some of the best of them:

ACCIDENTS IN AUSTRIA, 1890–94.

		NUMBER.	PERCENTAGE.
Fault of victim	Imprudence and gross negligence	10,937	22.60
	Disobedience of rules or neglect to use safeguards	1,563	3.23
	Willful misconduct	7	.01
Fault of employer	Defective plant	413	.85
	Omission of safeguards	218	.45
	Gross carelessness	53	.11
Fault of third person		762	1.57
Unforeseen contingencies		33,976	70.20
Unknown		471	.97
		48,400	99.99

These statistics extend through five years and embrace nearly 50,000 accidents to employees. It appears that fully seventy per cent of the accidents were declared to be unavoidable by the government officials who investigated them, and whose judgment, since the indemnities had to be paid without reference to the cause of the casualty, may be regarded as wholly unbiased.

It must be clear, upon reflection, that the conditions under which modern industry is carried on preclude the possibility of explaining every accident by somebody's negligence. This much was dimly understood when various countries took the first step of shifting the *onus probandi* from employee to employer. If, now, the employees are not to blame for the innumerable injuries to which they are subject, why should they be made to bear the financial burden of those injuries? Why should not that burden be distributed over the community instead of being concentrated upon a certain number of families who, in any event, will have to bear the physical

and mental suffering involved in the death, crippling or maiming of men? The risk of fire is undeniably greater in a gunpowder mill than in a brewery, but the owner of the mill does not bear the burden by contenting himself with lower profits than the brewer's; he simply pays for the greater risk by higher rates of fire insurance and passes the cost on to the consuming public in a higher price for his product. If the additional expense imposed upon a gunpowder manufacturer through the more frequent losses by fire can be thus recouped from consumers, why should not the expense of indemnifying his workmen for accidents be likewise made a part of the cost of production, and thereby transferred to the community at large? Only one thing will prevent such shifting of the burden, and that is, the ability of competitors to put their goods on the market without incurring like charges. Hence the law must require all competitors in a given trade to make the same compensation for the same injuries. This is what Europe has done; by compelling employers to compensate injured employees according to a fixed scale it has taxed the community, through higher prices of goods, for the support of its injured members.

Many minds bred in the philosophy of individualism will undoubtedly see in such legislation nothing but injustice to the employer. In reality such legislation is in strict conformance with the innermost spirit of English and American common law. It recognizes the existence of undeserved distress among workingmen and undertakes to alleviate their suffering by giving them a claim upon some person who is pecuniarily responsible. And that is precisely the principle embodied in the time-honored common-law rule that the principal is liable for the acts of his agent. No matter how blameless the principal or how blameworthy the agent, a third person aggrieved by an act of the agent is entitled to damages from the employer. The only possible justification of such apparent injustice is social expediency — the expediency of giving to an injured man a claim upon some person who is able to pay compensation. The reasoning used by the courts

to justify this practice of making one man pay damages for the negligence of some one else is like this:

> If a man chooses to carry on the operations of his life and business by having others to do the work for him, he can only be allowed to do so on the terms of guaranteeing the capacity of his servants to answer for acts and defaults committed by them in the course of the work he has ordered them to do.

The course of reasoning thus followed to justify the principal-and-agent theory of liability also justifies the workmen's compensation acts adopted by all the leading countries of Europe, which require the employer to assume all the risks of the employment which he calls into being. But while the employer makes the primary payment, just as he pays for the wear and tear of his machinery or the loss of his plant by fire, the consumers ultimately pay the cost. The alternative to such a general distribution of the financial burdens of industrial accidents is the present method, by which the entire burden is put primarily upon the poorest classes and, when it crushes them, to the damage of the community, is at last tardily assumed by the latter, through the public charities.

While all of the principal European nations have, by the recognition of such social obligations, reached what we have designated as the third stage in the evolution of accident legislation, many of them have advanced to a fourth stage. In England, Denmark and Spain the legislature was content to prescribe the compensation which an employer should pay for the injury of an employee. It did not furnish to the injured employee any security for such payment further than the usual liens upon the employer's property or upon any insurance money due him. The omission might prove a serious one upon occasion; for example, when a great colliery explosion kills scores of workmen the resulting indemnities would almost inevitably bankrupt the employer unless he had taken out an accident-insurance policy upon his mine. And on the Continent, where indemnities usually take the form of pensions rather than cash or lump payments, the possible bankruptcy or failure of an employer is an ever-present contingency. In

order to guarantee the payment of these indemnities the countries outside of the three mentioned above have resorted to compulsory insurance. Germany, the pioneer in the whole movement, adopted, as we have seen, the simple expedient of the collective responsibility of employers organized by industries. Austria employs the same system, except that the employers' mutual associations are organized by districts or provinces rather than by industries. In Italy and Finland employers may transfer their liabilities to such mutual associations; otherwise they must carry accident insurance in the state insurance office or authorized companies, or deposit securities with the proper state officers. Holland allows only the three latter alternatives, while Norway has gone still farther and made its state insurance institution the sole means of collecting premiums from employers and paying indemnities to workmen. France, finally, is trying the original method of giving injured working people a government guarantee of their pensions, through the proceeds of a special tax upon the establishments subject to the law.

Should the United States, or any of the states, enact a workmen's compensation law, one would expect the example of England rather than the Continent to be followed, at least until the impracticability of leaving the matter of insurance to the initiative of the employer has been fully demonstrated. And while the genius of America favors voluntary rather than compulsory insurance, the private institutions to furnish such insurance are already developing. Should Congress enact a law requiring interstate carriers to compensate employees for all injuries of their employment, it would find many of the largest systems already provided with insurance institutions in the form of relief funds, which, under government supervision, would serve their purpose admirably. On the other hand, should the individual commonwealths enact such compensation laws for all mechanical industries, they would find already in existence a large business in liability and accident insurance, which is being transacted by private companies. These companies are now issuing to employers workmen's collective

policies that promise the payment of stated sums for certain definite injuries; for example, in the event of death, or the loss of two eyes or limbs, a sum equal to one year's wages, not exceeding $1500; for the loss of one limb, a sum equal to one-third the above. Such blanket policies would be issued by many companies if public statutes required the compensation of accidents upon an established scale; and as insurance companies are already subject to public supervision, it would involve the introduction of no new principle to require their accident-insurance policies to conform to certain standards that might be embodied in a workmen's compensation act.

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